SUPREME COURT, U. S.

71-1083

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1971

BERNARD W. COBLENTZ,

Petitioner,

—against—

UNITED STATES OF AMERICA,

Respondent.

PETITION AND APPENDIX FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

JACOB W. HELLER,
ELKAN ABRAMOWITZ,
Attorneys for Petitioner,
295 Madison Avenue,
New York, New York 10017.

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IN THE

Supreme Court of the United States

October Term, 1971

BERNARD W. COBLENTZ,

Petitioner,

—against—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered January 10, 1972.

Opinion Below

The opinion of the Court of Appeals, not yet reported, is printed in the Appendix to this petition (A1-6).* The final memorandum and order of the District Court for the Eastern District of New York, dated May 6, 1971, was not reported; it is printed in full in the Appendix to this petition. (A7-11).

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*References to the Appendix will be preceded by the letter "A"; references to the Transcript of Proceedings in the District Court will be preceded by the letter "T".

Jurisdiction

The judgment of the Court of Appeals for the Second Circuit was entered on January 10, 1972 (A12). A timely petition for rehearing was denied on January 24, 1972 (A13), and this petition was filed within 30 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1) and Rule 22(2) of the Rules of the Supreme Court of the United States.

Questions Presented

1. Whether a criminal conviction for tax evasion can be sustained by the application of the doctrine of constructive receipt to a taxpayer who fully reported the proceeds of checks in the year said checks were negotiated by him but not in the year received by him?

2. Whether a criminal conviction for tax evasion can be sustained where the taxpayer deprived himself of the use of constructively received monies, any interest or profits thereon or benefit therefrom, until the year in which said monies were reported by him as income on his tax return?

3. Whether this Court should set appropriate standards and guidelines for the exercise of the government's discretion in determining which taxpayers are to be proceeded against civilly only and which proceeded against criminally?

4. Whether the so-called "substantial evidence" test of the Second Circuit in determining the sufficiency of the evidence to warrant submission of a criminal case to a jury should be examined in light of conflicting tests in other circuits?

Statute Involved

United States Code, Title 26:

§ 7201. *Attempt to evade or defeat tax.*

Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, together with the costs of prosecution.

Statement of the Case

Bernard W. Coblentz, a respected member of the Bar for close to forty years is a specialist in representing property owners in condemnation proceedings, particularly those involving the City of New York. It is a field in which he has been working almost exclusively for the last thirty years.

Procedures with respect to attorney's fees and retainer agreements in condemnation cases are governed by the Rules of the Appellate Divisions of the Supreme Court of the State of New York for the First and Second Departments. Under those rules, within thirty days after an attorney is retained, he must file with the Judicial Conference of the State of New York a "Retainer Statement", containing, among other things, the agreed terms of compensation. Within fifteen days of the receipt of the award on any claim the attorney must also file a "Closing Statement", indicating, among other things, the amount of the award and the portion retained by the attorney as his fee. (Rules of the Supreme Court of the State of New York, Appellate Division, First and Second Departments, Part 4, Rule IV).

In most cases, the time between the date of the retainer and the date of the award—during which the legal proceedings are commenced and concluded—is at least one year for a small piece of property and as long as three years for a larger parcel.

The core of the dispute in this case involves petitioner's system of deferred deposits of the checks issued to him by the City—a system he had employed consistently and undeviatingly for many years. The system had been adopted in the first instance upon the advice of an accountant years earlier and the system was known and explicitly approved by the Internal Revenue Service.

As soon as petitioner was retained, he prepared a file folder for each client and recorded the progress of the litigation on the outside of the folder. At the time of the award, the client generally received the sums awarded in multiple checks, at least one of which represented the amount of petitioner's fee plus advances or disbursements. The client would then endorse that check over to petitioner, and he would attach it to the file. Within fifteen days after petitioner received the check, he would file the closing statement with the Judicial Conference. After the statement was filed, the folder with the check was placed in a separate cabinet containing only files with undeposited checks; these files were maintained chronologically.

Periodically, petitioner would remove several of the files from the front of this cabinet and deposit the checks into his bank account. Once the checks were deposited, the files were placed in a tentative closed category, segregated for the remainder of the year. They remained in this category —all of the files for the particular year held together—until petitioner used these files to calculate the total fees deposited in the said year, a figure which he then gave to his accountant. These files were then closed permanently.

Under the system of deferred deposits employed by petitioner, only a portion of the checks issued by the City in any one year were actually deposited in that year; the remainder were deposited from one to four years after he had received them. His income tax returns, though, reflected his total deposits for the tax year, be they checks issued in that year or in earlier years. In other words, under petitioner's system, the checks were reported as income in the year in which they were negotiated, which was not necessarily in the year they were issued to him.*

Thus, for 1965—the one year for which petitioner was convicted—the face value of the checks which were issued to petitioner by the City, fully reported to the Judicial Conference, was $47,751.93. Yet, petitioner deposited only $7,600.33 of this amount, which, together with $14,799.67, necessarily representing deposits of prior years' checks, comprised his reported gross income for that year of $22,380.

Petitioner had employed this method of reporting income for almost thirty years upon the advice of a certified public accountant with whom petitioner shared an office when he first started to practice law.

In the late 1940's, petitioner was audited by the Internal Revenue Service during the course of which he was asked by a Revenue Agent about this method of reporting income and in response to which he explained his system of deferred deposits. The Revenue Agent specifically accepted petitioner's method of accounting without change by telling petitioner to continue to report the checks when they were deposited. Indeed, petitioner received a refund as a result of that audit.**

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* Unlike most checks which become stale if over a year old, New York City checks were honored up to approximately five years after the issue date.

** The Court of Appeals concluded that petitioner's testimony concerning this audit was "hardly credible" (A 16). To support

In 1966, the Internal Revenue Service, for the first time, raised a question as to the appropriateness of the deferred deposit system, claiming that the checks were "constructively received" and thus income in the year in which they were issued rather than in the year in which they were deposited. Since the inception of the investigation, petitioner has paid sufficient money to the government to cover his approximate tax liability under the government's theory, including penalty and interest, for the years 1963-1970.

The Indictment, in three counts, was filed in the United States District Court for the Eastern District of New York on February 26, 1970 and charged petitioner with wilfully evading his income taxes for the years 1963, 1964 and 1965 in violation of Title 26, United States Code, Section 7201. Coblentz pleaded not guilty on March 12, 1970.

Trial before the Honorable John F. Dooling, Jr., United States District Judge, and a jury, began on March 29, 1971 and ended on April 8, 1971 when the jury rendered a verdict of not guilty on Counts one and two (involving the years 1963 and 1964 respectively) and guilty on Count three (as to the year 1965). On April 21, 1971, petitioner moved: (1) to set aside the verdict on Count three; and (2) for a judgment of acquittal or, alternatively, for a new trial. In a memorandum and order dated May 6, 1971, Judge Dooling denied the motion, despite the fact that on several occasions throughout the trial, he candidly expressed serious doubts as to the efficacy of the government's case (T 427, 446, 1072).

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this conclusion, the Court relied upon testimony of the petitioner concerning a later meeting with the Internal Revenue Service in the 1950's (A 6). It is clear that the testimony concerning the latter meeting had no bearing on the testimony of the audit in the 1940's about which there was no contradictory evidence produced by the government.

On July 30, 1971, the court, pursuant to 18 U.S.C. § 3651, sentenced petitioner to a term of imprisonment of one year, eleven months of which was suspended and imposed an uncommitted fine in the amount of $5,000, which has been paid. Petitioner was released on his own recognizance pending appeal.

The United States Court of Appeals for the Second Circuit affirmed the conviction in an opinion dated January 10, 1972 (A1-6). On January 24, 1972, that Court denied petitioner's petition for rehearing, but ordered its mandate stayed and the continuance of petitioner's release on his own recognizance pending the determination of this petition for a writ of certiorari (A1-13).

Reasons for Granting the Writ

1. The decision below raises significant questions of first impression concerning the extension of the doctrine of constructive receipt to criminal tax fraud cases.

The remarkable aspect of this prosecution is that it marks the first time, to our knowledge, that the government has sought a criminal conviction for tax evasion based upon the peculiarly civil doctrine of "constructive receipts". Neither the government nor the courts below were willing squarely to face the question of the appropriateness of this extension.

The doctrine of "constructive receipt"—by definition a legal fiction—is, we submit, incapable of application in a criminal context. The doctrine in the tax area is almost always applied in situations where income is reported fully in a later year and the government claims it should have been reported in an earlier year. As a result, unlike the usual tax evasion case, there is no element of withholding the full reporting to the government of income received by the taxpayer.

Even in a situation where, as here, a taxpayer applies a consistently erroneous method in determining when his income is to be reported, there is no question of withholding the reporting of income. Thus, in any one of the years for which petitioner was indicted—1963, 1964 or 1965—the income reported consisted in large part of checks received in earlier years and cashed in the tax year, and in small part of checks received in the tax year and cashed that year. But in no event during said years did he fail to report as income the proceeds of any check which he negotiated.* The question involved in this case purely and simply is whether the income was reported in the proper year—an issue which, we submit has absolutely no overtones of criminality attached to it.** This is parti-

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*The Court below relied on the familiar principle of *Holland* v. *United States*, 348 U.S. 121 (1954) that a consistent pattern of under-reporting is sufficient evidence of wilfulness. That case is inapposite with the one at bar, for rather than a consistent pattern of under-reporting, the facts here reveal a consistent pattern of *full* reporting in what has now been determined to be the wrong years. Thus, *Holland, supra*, relied upon by the Court of Appeals, does not supply the authority that the evidence of wilfulness was sufficient to sustain the conviction.

** There is nothing intrinsically venal in a good faith effort to defer actual use of income to a later year in order to minimize tax liability. Such income-deferral, tax avoidance schemes abound in the Internal Revenue Code.

For example, there are permissible deferred compensation plans, whereby salaries and bonuses earned in one year but made available in later years are taxable under some circumstances in the later years. Revenue Rulings 60-31; 69-650. See 2 *Rabkin & Johnson, Federal Income, Gift and Estate Taxation*, § 14.01A. Also, a corporate employer in some circumstances may deduct expenses in one year which it pays to a shareholder-employee in the next year, who pays tax in the later year. 2 *Rabkin & Johnson, supra*, § 14.08; Internal Revenue Code, § 267(a). Lastly, a stockholder who sells short in one year, but does not deliver the stock until a later year, pays tax only in the year of delivery. 3 *Rabkin & Johnson, supra*, § 34.07(1) and (2); Internal Revenue Code, § 1233.

Even though petitioner's deferred deposit system was determined to be erroneous because of the application of the construc-

cularly so where petitioner deprived himself of the use of the money—or any benefit whatsoever therefrom, including simple interest—until the year in which the proceeds of the constructively received checks were cashed.

Nothing in *Sansone* v. *United States,* 380 U.S. 343 (1965) is inconsistent with this argument. In *Sansone,* the taxpayer understated his income in 1957, intending, he claimed, to report it in 1958 when he expected certain offsetting expenses to arise. The Court held that this intent, even if believed, was no defense to Section 7201, 380 U.S. at 354. In the case at bar, however, the checks received were in fact reported as income in the year in which they were negotiated. Such does not appear to be the case in *Sansone.* This Court's opinion does not indicate that the income was reported in the subsequent year as allegedly intended. As far as petitioner herein was concerned, he did not have the use of the proceeds until the checks were negotiated, and, once they were negotiated, he reported the checks as income. The taxpayer in *Sansone* intended to and did deprive the government of its tax revenues while he had actual use of the proceeds from the sale of real estate, here, petitioner, in his mind and in actuality, never had the use of the money represented by the checks until the year he negotiated, reported and paid the tax on them.

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tive receipt doctrine, there was at least a split in authority as to whether the doctrine could be universally applied to uncashed checks. Compare *Asa V. Johnston,* 23 TCM 2003 (1964); *Walter I. Bones,* 4 TC 415 (1944) (uncashed checks not income in year of receipt), with *Charles F. Kahler,* 18 TC 31 (1952); *Hedrick* v. *Commisisoner,* 154 F.2d 90 (2d Cir.), *cert. denied,* 329 U.S. 719 (1946) (uncashed checks income in year of receipt). Whether the facts in this case are closer to those in the *Johnston* line of cases, *supra,* or to those in the *Kahler* line, *supra,* is truly beside the point; the defendant, in good faith, upon the advice of experts, chose to rely upon the *Johnston* line. Such a choice, if erroneous, should result only in civil liability—and petitioner has paid sufficient back taxes to cover that liability.

Moreover, there was absolutely no element of criminality in petitioner's conduct with respect to the checks. The total face amount of the checks he received in any one year was on file with the Judicial Conference and available to the Internal Revenue Service; the checks were openly negotiated and deposited at petitioner's bank; in the relevant tax years, there were no altered documents, hidden transactions, false statements, unaccounted for currency—in short, none of the traditional indicia of criminal conduct was present in this case. Petitioner's conduct was in all respects that of a taxpayer who honestly and fully reported his income under an erroneous definition of what constituted income.

We sincerely believe that the evidence is insufficient even to constitute civil tax *fraud*, even though we fully concede civil liability for the consequence of reporting income in the wrong years under an erroneous concept of income. But, even if the evidence were sufficient to constitute civil fraud, we submit, the government severely abused its discretion in this case in choosing to proceed criminally rather than civilly.

We realize and appreciate that the line between conduct which should be prosecuted criminally and that which should be proceeded against only civilly is not clear. We realize also that it is no defense to a criminal charge that others similarly situated have not been charged with crime. However, there are reported decisions where taxpayers were apparently held only civilly liable for conduct, which, we submit, objectively revealed the kind of wilfulness—and criminality—totally lacking in this case.*

* For example, in *Maximilian Morrof*, 26 TCM 985 (1967), the taxpayer, an attorney, filed no federal income tax returns for five years and filed his returns for a subsequent period four years late. He bought savings bonds in his wife's name, purchased securities for cash (and tried to have the dealer keep it a secret), and kept no records of his income from his practice. In *Norman*

The criminal fraud penalty of Section 7201 is a severe and serious one—especially as applied to an attorney. It is a penalty which should not be sought by the government unless the facts clearly warrant it, especially because the government is not without recourse to collect the proper revenue through civil means.

We believe this Court, by granting certiorari, can at least put some brake on the unfettered discretion vested in the government under the present posture of the law to elect between civil and criminal prosecution—a discretion that has not as yet been examined by this Court and a discretion which should be subject to some guidelines and perimeters.

2. The decision below conflicts with the decisions of other Courts of Appeals as to the proper test for sufficiency of evidence warranting submission of a case to a jury.

The District Court, in deciding whether petitioner was entitled to a directed judgment of acquittal or if the case should go to the jury, applied the so-called "substantial evidence" test in determining the sufficiency of the evidence, the prevailing rule in the Second Circuit. We urge this Court to examine this rule, because there can be no question whatever that under the other tests employed by other

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P. Van Valkenburgh, 26 TCM 753 (1967), the taxpayer, a businessman, failed to record various amounts of income for rental and installation of equipment and from sales pursuant to his own specific instructions. The taxpayer lied to the Internal Revenue Service by stating that he seldom, if ever, rented equipment. Additionally, a major part of the business expenses deducted were, in actuality, taxpayer's personal expenses, charged to the business under his instructions. In *C. R. Rich*, 6 BTA 822 (1927), the taxpayer altered his books to reduce his tax liability, did not record a large sale in his books and failed to report the profit from that sale. Lastly, in *Boyett* v. *Commissioner*, 204 F.2d 205 (5th Cir. 1953), the taxpayer, a dentist, personally maintained sizeable amounts in savings accounts in other names and cashed, rather than deposited, many of the checks given to him by patients.

federal circuits, the trial judge here would have been required to enter a judgment of acquittal.

Throughout the course of the trial, the District Court repeatedly commented as to how difficult a case this was (T 1072), as to how thankful he was not to be a juror (T 427), and how the case was only "in by a hair" (T 446). During the colloquy at the close of the government's case, he implied he might have granted petitioner's motion had he applied the "rational hypothesis test" (T 426-29).

There are in the various Courts of Appeals different tests as to when the trial judge must grant a motion for a directed verdict of acquittal. The rule in the Second Circuit, for over twenty-five years, has been the one set forth in *United States* v. *Feinberg*, 140 F.2d 592 (2d Cir.), *cert. denied*, 322 U.S. 726 (1944), which prescribes the same standard in both civil and criminal cases, and mandates that the case go to the jury if there is " 'substantial evidence' to support a guilty verdict." *Neaderland* v. *Commissioner*, 424 F.2d 639 (2d. Cir.), *cert. denied*, 400 U.S. 827 (1970).

Different standards apply in other circuits: one is, whether "taking the view most favorable to the Government, a reasonably-minded juror might accept the relevant evidence as adequate to support a conclusion of the defendant's guilt beyond a reasonable doubt." *Lambert* v. *United States*, 261 F.2d 799, 801 (5th Cir. 1958). See also *United States* v. *Matsinger*, 191 F.2d 1014, 1016 (3rd Cir. 1951); *Linden* v. *United States*, 254 F.2d 560, 567 (4th Cir. 1958); *United States* v. *Conti*, 339 F.2d 10, 13 (6th Cir. 1964); *United States* v. *Nelson*, 419 F.2d 1237, 1242 (9th Cir. 1969); *Curley* v. *United States*, 160 F.2d 229, 232 (D.C. Cir.), *cert. denied*, 331 U.S. 837 (1947).

Additionally, the Fifth Circuit has a special rule in cases, such as the one at bar, where the Government relies on circumstantial evidence to establish an essential element of the crime:

> "To sustain conviction, the inferences reasonably to be drawn from the evidence must not only be consistent with guilt of the accused but inconsistent with every reasonable hypothesis of his innocence. . . . In such cases, the test to be applied on motion for judgment of acquittal and on review of the denial of such motion is not simply whether in the opinion of the trial judge or of the appellate court the evidence fails to exclude every reasonable hypothesis, but that of guilt, but rather whether the jury might reasonably so conclude . . . (citations omitted)." *Vick* v. *United States*, 216 F.2d 228, 232 (5th Cir. 1954).

See also *United States* v. *Duke*, 423 F.2d 387, 389 (5th Cir. 1970); *Harper* v. *United States*, 405 F.2d 185, 186 (5th Cir. 1969); *O'Connell* v. *United States*, 402 F.2d 760, 761 (5th Cir. 1968).

It is obvious from the remarks of the District Court that he felt constrained to apply the "substantial evidence" test. We feel that had either the "reasonable doubt" or the "circumstantial evidence" tests been applied, it is clear that petitioner's motion for a directed verdict of acquittal should have been granted. The Court's own statements as to the difficulty of the case clearly showed his doubts as to whether the jury could accept the evidence as adequate to support a conclusion of guilt beyond a reasonable doubt. Indeed, Judge Dooling strongly implied that if the applicable rule were the "circumstantial evidence" test (which we believe he intended when referring to the "Third Circuit rule"), he would have directed a verdict of acquittal, because the evidence clearly sustains reasonable hypotheses of petitioner's innocence.

As the Second Circuit has repeatedly evidenced its support of the *Feinberg* rule, *see, e.g., Neaderland* v. *Commissioner, supra,* we respectfully submit that the time has come for this Court to subject that rule to close analysis and to resolve this conflict in the circuits.

CONCLUSION

Under all the circumstances herein set forth, it is respectfully prayed that a writ of certiorari should issue to review the judgment and opinion of the Second Circuit.

Respectfully submitted,

JACOB W. HELLER,
ELKAN ABRAMOWITZ,
Attorneys for Petitioner.

APPENDIX

Appendix A

Opinion of United States Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

N. 349—September Term, 1971.
(Argued December 15, 1971. Decided January 10, 1972.)
Docket No. 71-1943

UNITED STATES OF AMERICA,

Appellee,

—against—

BERNARD W. COBLENTZ,

Defendant-Appellant.

Before:

SMITH, KAUFMAN and MULLIGAN,

Circuit Judges.

Appeal from a conviction for tax evasion (2 U.S.C. § 7201) after a jury trial before Judge John F. Dooling, Jr. in the United States District Court for the Eastern District of New York.

Affirmed.

CONO R. NAMORATO, Department of Justice, Washington, D.C. (Scott P. Crampton, Asst. Attorney General, Meyer Rothwacks, Crombie J. D. Garrett, John P. Burke, Murray S. Horwitz, Attorneys, Department of Justice, Washington, D.C., Robert A. Morse, United States Attorney, Brooklyn, New York, of counsel), *for Appellee.*

JACOB W. HELLER, New York, N. Y. (Weiss, Bronston, Rosenthal, Heller & Schwartzman, Herman Schwartzman, Elkan Abramowitz, of counsel), *for Defendant-Appellant.*

MULLIGAN, *Circuit Judge*:

The appellant was indicted in the Eastern District of New York on February 26, 1970 on three counts of willfully attempting to evade his federal income tax for the years 1963, 1964 and 1965 in violation of Section 7201 of the Internal Revenue Code of 1954. He was tried from March 29, 1971 through April 7, 1971 before the Hon. John F. Dooling, Jr., United States District Judge. The jury returned a verdict of not guilty on the first two counts (1963 and 1964) and guilty on count three (1965). Thereafter appellant moved to set aside the guilty verdict and for judgment of acquittal, or in the alternative, for a new trial. Judge Dooling denied the motions in a Memorandum and Order on May 6, 1971. The appellant was subsequently sentenced to a one year term of imprisonment, eleven months of which were suspended, plus an uncommitted fine in the amount of $5,000. He was released on his own recognizance pending this appeal from the judgment of conviction. We affirm the conviction.

The appellant, Coblentz, is a New York attorney specializing in representing property owners in condemnation proceedings, particularly those involving the City of New York. The basis for Coblentz's indictment and subsequent conviction was his unorthodox method of reporting the fees he received in his condemnation practice on his income tax returns. When an award was made, his client would receive multiple checks from the City of New York, one of which would represent Coblentz's fee plus any advances or disbursements. The client would endorse that check over to Coblentz who would then place the check in a cabinet in his office which contained other undeposited checks which were filed chronologically. Coblentz would deposit only a portion of the checks in the year they were received. The remainder were deposited from one to four years after the year of receipt. Since the checks were drawn by the City of New York, they would be honored

up to five years after the date of issue. Coblentz did not report these fees as income in the year they were received by him but usually in the year in which he deposited or negotiated the check. Pursuant to the rules of the Appellate Division, First and Second Departments, Coblentz did, however, file with the Judicial Conference of the State of New York, Closing Statements which reported the fees he received within fifteen days after they were awarded. A comparison of these Closing Statements and his income tax returns, revealed that Coblentz had received fees from 1962 through 1965 which exceeded the income he had reported for those years by about $75,000.

The government's evidence established that in 1965 Coblentz reported to the Judicial Conference that he had received fees of $47,751.93. He deposited only $7,600.33 of this amount, and reported a gross income of $22,380 which included checks received in prior years but not reported until 1965. In 1963 the Closing Statements indicated fees of $25,188.08 while the tax return reported gross receipts of $22,600. In 1964 the Closing Statements indicated fees of $58,388.39 and the tax return reported gross receipts of $21,300. There is no question but that there were substantial discrepancies during the period covered by the counts of the indictment between income received and income reported. It is also beyond any question that the receipt of these checks constituted the constructive receipt of income in the year they were received whether Coblentz elected to then take down the cash or not. *Corliss* v. *Bowers*, 281 U.S. 376, 378 (1930); *Weil* v. *Commissioner*, 173 F.2d 805, 806 (2d Cir.), *cert. denied*, 338 U.S. 821 (1949); *Ross* v. *Commissioner*, 169 F.2d 483, 490 (1st Cir. 1948); *Hedrick* v. *Commissioner*, 154 F.2d 90, 91 (2d Cir. 1946), *cert denied*, 329 U.S. 346 (1946). Treas. Reg. § 1.451-2. See generally 2 J. Mertens, Law of Federal Income Taxation § 10.01

(1967).

Appellant's major argument on appeal is not that tax was not due and owing in 1965 but that the evidence was insufficient as a matter of law to warrant the jury's finding that he "willfully" evaded his tax. It is essential that the government establish beyond a reasonable doubt that Coblentz acted willfully and knowingly with the specific intent to evade the tax. Further, this specific intent must be established by evidence other than the mere understatement of income. *Holland* v. *United States*, 348 U.S. 121, 139 (1954).

We find that the record amply supports the jury's finding of willful tax evasion by Coblentz. From 1963 to 1965 Coblentz reported a total taxable income of $30,351.09 when in fact it should have been $109,017.42. This would have resulted in an additional tax of $5,243.98 in 1963, $21,581.44 in 1964 and $13,686.61 in 1965. This represents a consistent pattern of not reporting large amounts of income which is itself evidence of willfulness. *United States* v. *Holland*, *supra*, 348 U.S. at 139; *United States* v. *Moran*, 236 F.2d 361, 362 (1956), *cert. denied*, 352 U.S. 909 (1956). Since Coblentz admittedly prepared and signed the Closing Statements for the Judicial Conference there can be no question but that he was aware of this source of income. Moreover, he supplied the information which was used by his accountants to prepare the returns. See *United States* v. *Levy*, 449 F.2d 769, 770 (2d Cir. 1971). Further evidence of willfulness was established by his filing in 1961, 1962, 1963 and 1964 as the "unmarried head of household" which resulted in a lower tax than had he filed properly as "married, filing separately" (his wife was filing separately these years). The jury apparently found it incredible that he could be mistaken about his marital status and further incredible that on his 1961 tax return he could "mistakenly" give the address of his sister, instead of the residence where he was living with his wife. It is well established that the jury could properly have considered this evidence (relating to

the years 1961 through 1964) on the issue of intent to defraud in 1965, even though they found appellant not guilty of tax evasion for the years 1963 and 1964. *Dunn* v. *United States*, 284 U.S. 390, 393 (1932); *Schafer* v. *United States*, 265 F.2d 750, 754-55 (8th Cir.), *cert. denied*, 361 U.S. 844 (1959); *Bryson* v. *United States*, 238 F.2d 657, 663 (9th Cir. 1956), *cert. denied*, 355 U.S. 817 (1957); see *Steckler* v. *United States*, 7 F.2d 59, 60 (2d Cir. 1925) (Hand, *J.*), There is additional evidence of willfulness in the record. Coblentz, an attorney, kept no books or records except the Closing Statements required by the Judicial Conference; he did not even maintain check stubs for the years 1963 to 1965; he estimated in round figures on his tax return both his income and his expenses and even his savings bank interest.

Appellant's major defense to the charge of willfulness was his claimed unawareness of the "constructive receipt" doctrine; that in good faith, he relied upon the advice of experts upon the theory that income was realized only when the check was deposited. Judge Dooling's charge to the jury very carefully protected the defendant's mistake of law position. He charged that the defendant could not be convicted unless the jury find that Coblentz "believed that he owed substantially more tax than was shown by the tax return as filed" and that he filed a return "knowing that it was fraudulent or false as to a material matter for the specific purpose of evading or defeating the collection of the additional tax that he believed was due over and above the tax disclosed by the return as filed." This charge was repeated in detail including the admonition that "If you find that the defendant did not have the specific intention of evading or defeating a tax that he believed to be due over and above the tax shown on the return, then you must acquit the defendant of the charge of willfully attempting to evade or defeat the tax."

The jury obviously did not accept the contention that Coblentz was making a good faith error. In addition to the evidence of willfulness already discussed, we find ample support for the skepticism of the jury in the record. The testimony of Coblentz that he had been advised by an accountant that he need not report checks as income until deposited was considerably weakened by his inability to recall the name of the accountant although he claimed that he had shared office space with him. His testimony that the Internal Revenue Service was aware of his system and had approved it, was hardly credible when he stated on cross-examination that he had previously been assessed for a deficiency in 1954 or 1955 because of a "theory of accounting." The testimony of appellant's accountant was also damaging when he admitted that fee checks totalling $8,318.10 received in 1963 and cashed in 1967, were not included in the gross receipts reported by appellant in 1967. This was hardly consistent with the claimed theory that fee checks became income only when cashed.

Appellant's motion for a directed verdict of acquittal was denied at the close of the government's case. He now asks this court to reconsider the long standing rule of the Second Circuit that such a motion be denied if there is "substantial evidence" to support a finding of defendant's guilt. *United States* v. *Feinberg,* 140 F.2d 952 (2d Cir). *cert. denied,* 322 U.S. 726 (1944). This rule has been repeatedly enunciated in this Circuit (see *Neaderland* v. *Commissioner,* 424 F.2d 639, 642 (2d Cir.), *cert. denied,* 400 U.S. 827 (1970)) and we see no reason to adopt any other version. In any event, if, after the denial of a motion for acquittal at the end of the government's case, the defendant offers evidence, he waives any claim as to the sufficiency of that case considered alone. *United States* v. *Rosengarten,* 357 F.2d 263, 266 (2d Cir. 1966).

After considering all of the other points raised on appeal and finding them to be without merit, we affirm.

Appendix B

Memorandum and Order of District Court

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

70 CR 118

UNITED STATES OF AMERICA,

—against—

BERNARD W. COBLENTZ,

Defendant.

Defendant moves under Rules 29(c) and 33 for a judgment of acquittal and, alternatively, for a new trial. The motion raises, in the main, matters that were presented and rejected during trial. It is argued additionally that conviction on Count 3 was inconsistent with acquittal on Counts 1 and 2 and with findings that acquittal as to the earlier years implied.

There is here on fair basis for arguing inconsistency, The evidence about the third year showed abandonment of the incorrect assertion, made in earlier years, that defendant was "single," but it introduced at least one significantly new factor, a change in accountant coupled with evidence of misstatement to the new accountant and persistence in the non-reporting of income for a year as to which the jury was able to find that inquiry had been made by the new accountant. Moreover, the jury could, reasonably, have argued to itself that reasonable doubt might arise upon the proofs about the first year, might still be wrung from them for a second year, but could hardly arise upon the proofs for a third year against the background of persistence.

Nor does *United States* v. *Maybury*, 2d Cir. 1960, 274 F.2d 899 reach the present case. There a divided Court reviewing a non-jury conviction, saw in the acquittal on one Count a necessarily implied finding that directly precluded the finding of an essential element of the Count on which the trial judge convicted.

Defendant renews, too, his central contentions (1) that the jury issue on the question, When were the checks income? was wholly factual and that it was error to instruct that the checks were income as a matter of law when received if drawn by a solvent drawer, received in payment for services rendered, unconditionally delivered, and collectable at any time the recipient chose, and (2) that it was error to instruct that as a matter of law defendant's alleged practice of reporting checks as he cashed them did not constitute a "method of accounting" under Internal Revenue Code § 451(a). Both points appear plain—and they do not settle the central question in the case. Did defendant in good faith believe that fee checks became income only when he elected to cash them? Whether his tax return filing practice reflected adherence to such a theory presented an evidentiary aspect of the question.

That the checks were income when received if they met the standards set out in the charge is plain. See Code § 451(a); *Lavery* v. *Commissioner*, 7th Cir. 1946, 158 F.2d 859, 860; *Rosenberg* v. *United States*, E.D. Mo. 1969, 295 F. Supp. 820, aff'd. 8th Cir. 1970, 422 F.2d 341; *Obland* v. *United States*, E.D. Mo. 1967, 278 F. Supp. 989. Note *Kahler* v. *Commissioner*, 1952, 18 T.C. 31. Contrast *Fischer* v. *Commissioner*, 1950, 14 T.C. 792, 801-802.

That no "method of accounting" within Sections 446, 451 was in use is plain. The evidence of defendant was that he had no accounting records or method of accounting. He did not write up his check stubs; he did not maintain any record of his receipts and disbursements in even the most rudimentary single-entry form. He retained his bank statements and cancelled checks, and kept his case-folders on the outside of which were jottings that only de-

fendant could interpret. The jottings on the case-folders were not, however, records of transactions, and they were not organized as, nor amenable to organization and examination as, a coherent record of transactions. Defendant retained his case-folders for an indeterminate period. In each case-folder was defendant's final report to the Judicial Conference of the State of New York which disclosed the amount of his fee-earnings in the New York City condemnation case to which that case-folder referred (and such condemnation cases were defendant's only regular source of professional income); the report gave the date when the check covering the fee was received from the City. The Judicial Conference reports did not disclose when the checks were deposited for collection. No ordered office or personal record of any kind disclosed the dates when the city's checks were deposited and related the checks, their deposit dates, and the portions thereof that constituted fee-earnings to the case-folders and to the client involved. Some bank statement would disclose every deposit of a check and its date, but that entry would not identify the check by its date and case-folder source, and would not show what portion of the check constituted fee and what portion an award-amount that defendant had advanced or paid to a client. The sequence of event surrounding the deposit of a City check comprised removal of the case-folder from the live file, removing the City check or checks from it, depositing the check or checks in bank, and placing the folder atop a file cabinet with other case-folders of that period from which the checks had been removed for deposit. No list of the checks or breakdown of checks between fee and other elements was then made, although, of course, the reports to the Judicial Conference remained in each case-folder. No jotting on the outside of the case-folder was pointed to as disclosing the date of deposit. There was, finally, no annual summary or list of any sort (currently or) periodically pulling together the raw data derivable from the case-folders (and the Judicial Conference

reports) when they were stripped of the City checks or when the checks were put into them. No table of expense was kept and the expenses reported in the return did not correspond to checks drawn by defendant. The bridge from the taxable events to the tax returns was not any mediating set of entries, or verifiable list but defendant's oral, round-amount and inscrutable reading to his accountant from a notation of a global figure for the year's gross income from fees, a figure which itself was an estimate derived from going over the files atop the file cabinet for that year.

Defendant's description of his practice was complete, but it did not disclose that (in the sense of Sections 446(a) and 451(a)) he kept any books or had any method of accounting by which he regularly computed his income from such books, or that he ever or regularly computed his income from or in any books. The statute visualizes that taxpayers who keep books and compute income on and by them may use their book-income as the base for their taxable income (with statutory adjustments that give effect to specific Code requirements without departing from the taxpayer's basic book-method of computation) provided their method of book-keeping clearly reflects income on a consistent basis. The statute does not signify that a practice of including gross income in tax returns by a supposed rule the existence and regular operation of which is not reflected in any examinable set of books, and a practice of reporting gross income items in tax returns at times not determinable from any examinable set of books (however rudimentary) can qualify as a method of accounting under Sections 446 and 451. See Code § 6001; 26 C.F.R. §§ 1.446-1(a)(2), (4)(b)(2); 1.6001-1(a), (e); *Webb* v. *Commissioner*, 5th Cir. 1968, 394 F. 366, 371; *Plisco* v. *United States*, D.C. Cir. 1962, 306 F.2d 784, 786; *Armstrong* v. *United States*, Ct. Cls. 1965, 354 F.2d 274, 287-288.

Defendant, of course, did not have to prove that he had and adhered to a regular method of accounting. But he

met the Government's case—charging him in each year with the amount of the fees that he had himself reported to the Judicial Conference that he had in that year received City checks to cover, and crediting him with the deductions that he had claimed on his filed returns—with the argument that his regular method of accounting explained his reporting practice. The evidence that defendant himself presented and elicited as a matter of law eliminated any contention that the jury could find that the Government had failed to negate beyond a reasonable doubt the possibility that defendant had consistently pursued in the years in question a method of accounting that, if consistently pursued, had statutory support and therefore could negate the tax liability and/or an intention to evade or defeat tax. Defendant's own evidence eliminated that possible issue for his evidence affirmatively established that, in the sense of Sections 446(a), 451(a), he had no "method of accounting," kept no books, and did not "regularly compute[s] his income in keeping his books" under any "method of accounting." Consistency of tax return filing practice does not negate the intention to evade or defeat tax for it can reflect consistent adherence to a tax evasion plan; the central issue remained, Did the Government exclude reasonable doubt by negating a good faith belief on defendant's part that City checks were income only when collected. The jury evidently concluded that it had done so at least as to the year 1965. The "accounting" issue, simply was not in the case.

It is

ORDERED that the motions for a judgment of acquittal and for a new trial are denied.

Brooklyn, New York
May 6, 1971.

JOHN F. DOOLING, JR.,
U.S.D.J.

Appendix C

Judgment of United States Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a State Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the tenth day of January, one thousand nine hundred and seventy-two.

Present:

HON. J. JOSEPH SMITH,
HON. IRVING R. KAUFMAN,
HON. WILLIAM H. MULLIGAN,
Circuit Judges.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

BERNARD W. COBLENTZ,
Defendant-Appellant.

Appeal from the United States District Court for the Eastern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed with costs to be taxed against the appellant.

A. DANIEL FUSARO,
Clerk.

Appendix D

Order of United States Court of Appeals Denying Petition for Rehearing

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

71-1943

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

BERNARD W. COBLENTZ,
Defendant-Appellant.

A petition for a rehearing together with a motion in the alternative to stay the issuance of the mandate with the continuance of appellant's release on his own recognizance pending application for a writ of certiorari to the Supreme Court of the United States having been filed herein by counsel for the appellant,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is denied. The petition to stay the issuance of the mandate and continuance of appellant's release on his own recognizance pending application for a writ of certiorari to the Supreme Court having been filed, is granted.

Dated: January 24, 1972

J. JOSEPH SMITH
IRVING R. KAUFMAN
WILLIAM H. MULLIGAN